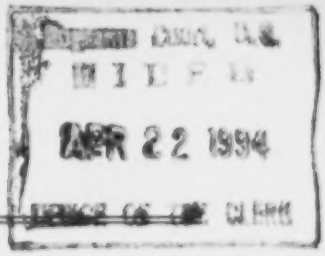

No. 93-1496

In The

Supreme Court of the United States

October Term, 1993

MISSOURI PACIFIC RAILROAD COMPANY d/b/a
UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

GRANT TINGSTROM, III,

Defendant.

**On Petition For Writ Of Certiorari
From The Supreme Court Of Louisiana**

BRIEF IN OPPOSITION TO MISSOURI PACIFIC'S APPLICATION FOR WRIT OF CERTIORARI

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I. SUMMARY OF FACTS

A. THE PARTIES, THEIR RELATIONSHIP AND THE MATERIAL FACTS

In March 1988, the respondent, Grant Tingstrom, III (Tingstrom) lived in Bay St. Louis, Mississippi and worked for Missouri Pacific Railroad Company (Missouri Pacific) as a railroad engineer. Tingstrom was 28 years old, had been working for Missouri Pacific for 10 years, and was a third generation railroad engineer.

Missouri Pacific had a negotiated agreement with the Missouri Pacific employees which provided that when its employees were required to lay-over in a town other than their home, the railroad must provide transportation to and from the railroad provided lodging.

Missouri Pacific, as a result of its duties under the agreement mentioned above, had a contract with the Newcourt Inn, a motel in Port Allen, Louisiana, whereby the railroad employees would lodge at the Newcourt Inn when the crews were required by their work to lay-over in Port Allen.

Part of the contract between the Newcourt Inn and Missouri Pacific specifically required the motel to furnish courtesy van service to and from the railroad yard for Missouri Pacific employees. In furtherance of its contract with Missouri Pacific, the Newcourt Inn contracted with the defendant, William L. Smith (Smith) to transport the Missouri Pacific employees to and from the yard and the motel for a fixed price.

Smith had been hauling Missouri Pacific employees for 7 or 8 years. Before Smith could haul the Missouri

Pacific employees, the railroad sent someone out to inspect his cabs and to provide Smith with a safety pamphlet and other instructions. Smith also had posted in his cab a placard that was entitled "Union Pacific Railroad-Crew Van Instructions".

Pat Crabtree, the Missouri Pacific division superintendent in charge of the Louisiana service unit, testified that if Missouri Pacific had determined after an inspection that the cab was not safe, then Missouri Pacific had authority to stop the use of that cab. The railroad also required proof that Mr. Smith had insurance covering his cab.

On March 7, 1988, Tingstrom reported for duty in Avondale, Louisiana, which was his home terminal. Tingstrom had, for this work period, been assigned to engineer a spray train up the Missouri Pacific track spraying the vegetation on the railroad right-of-way. On March 7th, Tingstrom and the crew (three others) sprayed to approximately Addis, Louisiana. At the end of the day, the crew pulled the train into the Addis yard and got into a cab that was waiting for them. The cab had been called by Missouri Pacific to pick up the crew and the cab took them to the Newcourt Inn.

The next morning Tingstrom and the remainder of the crew got wake-up calls from Missouri Pacific which told them what time they were to report to work at the Addis yard. The men did not even need to call a taxi. The taxi was waiting for them when they went down into the lobby of the Newcourt Inn. At the end of work on March 8th, the crew once again brought the train back into the Addis yard and once again Missouri Pacific had a cab

waiting for them and the cab returned the railroad employees to the Newcourt Inn.

On the morning of March 9, 1988, Tingstrom received a wake-up call from Missouri Pacific Railroad. Tingstrom was told to report to work at 7:00 a.m. However, either due to the time that the call was received or when the cab arrived at the Newcourt Inn, Tingstrom and his co-employees left the motel at approximately 7:30 a.m. As was the procedure, neither Tingstrom nor any of his crew had called for the cab.

When the crew got into the cab at the Newcourt Inn, Tingstrom got in the left rear seat, behind the driver. The cab was being driven by William L. Smith who was doing business as Smith's Cab Service.

As the cab, a 1977 Ford LTD, was proceeding down a rainslicked Louisiana Highway 1 in Brusly, Louisiana, it ran into the back of a Chevrolet van.

The lady driving the three-quarter ton van hit by the cab stated: "To me it (the cab) looked heavily damaged". A wrecker had to be called to remove the cab. The trooper who worked the wreck said there was heavy damage.

Immediately after the accident, Tingstrom complained of being hurt in the accident and one of his co-employees noticed blood and abrasions on Tingstrom's back. Another co-employee testified Tingstrom held his back and complained of pain at the *scene*. (Both of these men were still employees of the railroad at the time of trial.) Additionally, the driver of the van also remembered noticing that one of the employees of the railroad appeared to be in pain.

After the accident, Tingstrom and the other employees were transported by other means to the railroad yard at Addis. At the yard in Addis, an employee of Missouri Pacific administered first aid to the abrasions and lacerations on Mr. Tingstrom's back. Tingstrom, obviously in pain, was sent home by the railroad. Tingstrom then went directly to the emergency room where he saw a medical doctor.

Tingstrom went on (in the next one and one-half years) to have two back operations. Every doctor who saw Tingstrom definitively linked his back operations to the accident of March 9, 1988. It should also be noted that despite his back problems, Tingstrom (on several occasions) went to his doctors and *asked* them to give him releases to go back to work. Tingstrom actually went back to work, but (due to continuing back problems) Tingstrom was not able to work for any sustained period of time.

There was absolutely no dispute at trial or in any appellate briefs as to any of these facts.

B. THE JURY'S VERDICT

Based upon the foregoing *undisputed* facts, the jury in this case found as follows:

1. The jury found Tingstrom, a guest passenger in the *backseat* of the automobile, 50% negligent.

2. The jury awarded Tingstrom only $40,000.00 for past pain and suffering for a two year period prior to trial that included 2 (two) back surgeries, numerous tests and pain classified by all the doctors as severe.

3. The jury did not award Tingstrom any past or future medical expenses although every doctor (including two neurosurgeons) who saw Tingstrom directly connected his nerve impingement and two back surgeries to the automobile wreck.

4. The jury did not award any amount for loss of past or future income although every doctor and the only vocational rehabilitation expert who saw Tingstrom was of the opinion that he was unable to return to work as a result of the accident.

5. The jury did not award any amount for future pain and suffering although all of the doctors (including defendant's own medical doctor witness) stated Tingstrom would be in pain for the rest of his life.

6. The jury found that Tingstrom was *not* in the course and scope of his employment; therefore, Missouri Pacific was not answerable for Tingstrom's damages. However, Missouri Pacific *admitted* in its Answer that Tingstrom *was* in the course and scope of his employment at the time of the wreck.

7. The jury found that a cab driver who had hauled railroad employees for Missouri Pacific for 7 - 8 years, was paid by the railroad, called out by the railroad, had railroad crew-van placards in his car, could only take the railroad employees to and from the motel and the railyard, and whose cab was inspected by the railroad *not* to be an agent of the railroad company.

C. AN EXPLANATION AS TO WHY THE JURY VERDICT WAS SO MANIFESTLY ERRONEOUS

The railroad argues in its application that the jury's verdict should not have been reversed. However, the respondent contends that the fact that a seasoned railroad lawyer had his way with a jury, by arousing prejudices and stereotypes and injecting legally irrelevant arguments into the trial, does not mean that justice was done. Often it portends otherwise. That is the case here and the facts set forth below may explain why the jury incorrectly applied the law to the undisputed facts.

By making an issue of the date a lawyer was consulted; by over and over mentioning that Tingstrom had a back predestined for problems; by arguing *with no evidence* and totally contrary to the record and the truth that plaintiff's lawyer selected a doctor; by bringing up Tingstrom's collateral income; by showing the jury 8 x 10 glossy photographs of what a nice, clean motel the Newcourt Inn was; by having a doctor not even on the pretrial and who had never seen Grant Tingstrom come in and talk about psychogenic problems and secondary gain; by over and over referring to this accident as a "fender bender."; by insinuating that plaintiff's back abrasions were self inflicted; by implying to the jury that there was something wrong with a doctor charging for a deposition; by arguing that surgery charges were exorbitant; by arguing that the railroad is the jury's neighbor and it saves them money; by arguing that the railroad provided jobs to jurors' relatives; by having a railroad employee fact witness talk about how many sedentary

jobs the railroad has and how easy it is to advance with the railroad, the railroad got a verdict in its favor.

The Court of Appeal correctly reversed that erroneous verdict. (Appendix C)

II. ARGUMENT

A. THE APPLICABLE LAW

The respondent, Tingstrom, respectfully represents that the decision of the First Circuit Court of Appeal for the State of Louisiana, which is appended as Appendix C, contains a correct legal analysis of the issues in this case. Those issues are: Was Grant Tingstrom, III in the course and scope of his employment at the time of the wreck? Was the cab driver, William Smith, an agent of Missouri Pacific?

1. The Course and Scope Issue

To illustrate the correctness of the court of appeal decision on the course and scope issue, Tingstrom refers this Honorable Court to *Mostyn v. Delaware L. & W. Railroad Company*, 160 F.2d 15 (CA2 1947). In *Mostyn*, Judge Learned Hand found that a railroad employee who was away from home was in the course and scope of his employment while going to and from work. Likewise, in *Leek v. Baltimore and Ohio Railroad Company and Yellow Cab*, 200 F.Supp. 368 (N.D.W.VA. 1962), a railroad employee riding home from work in a taxi was held to be in the course and scope of his employment.

More recently in *Vincent v. Harvey Well Service*, 441 F.2d 146 (CA5 1971), the Fifth Circuit Court of Appeal held that a worker injured in an automobile wreck on the way to work was in the course and scope of his employment. In *Empey v. Grand Trunk Western R. Co.*, 869 F.2d 293 (CA6 1989), the Sixth Circuit Court of Appeal made a similar finding in that it held that a railroad worker was in the course and scope of his employment when the worker was required to lay-over as a result of his job.

When the above cases, and the fact that the railroad in its Answer (Appendix E) admitted that Tingstrom was in the course and scope of his employment, are considered, it becomes clear that as a matter of law Tingstrom was in the course and scope of his employment with Missouri Pacific at the time of the wreck.

2. The Agency Issue

To establish that William Smith was an agent of Missouri Pacific at the time of the wreck, the respondent respectfully refers this Honorable Court to its own decision in *Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326, 2 L.Ed.2d 799, 78 S.Ct. 758 (1958). In the *Sinkler* case, the following language appears:

> ". . . . when a railroad employee's injury is caused in whole or in part by the fault of others performing under contract operational activities of his employer such others are "agents" of the employer within the meaning of Sec. 1 of FELA." at page 763.

The *Sinkler* decision has been followed through the years. See *Carney v. Pittsburgh and Lake Erie Railroad Company*, 316 F.2d 277 (CA3 1963); and, *Empey* and *Leek* cited above.

There are two other cases on the agency issue that merit mentioning. In *Penn Central Corp. v. Checker Cab Company*, 488 F.Supp. 1225 (E.D. Mich. 1980), the Court held:

> "Thus, it is clear that where a railroad utilizes cab services to *transport* its employees, these services can constitute an operational activity of the railroad, thus rendering the railroad liable for injuries sustained by the employees *in the course of the "cab transportation."*
>
> * * *
>
> "When sued by its employees, a railroad cannot defend on the ground that negligent acts performed by third parties in the course of its operational activities were the actual cause of the injuries. *An employee has a right to seek and obtain recovery from his employer in this situation."* [Emphasis Added]

Finally, this Honorable Court in *Hopson v. Texaco*, 383 U.S. 262, 15 L.Ed. 2d 740, 86 S.Ct. 765 (1986), applying the FELA standard, found a cab driver to be the agent of the employer.

The above cases illustrate that the decision in the present case is correct under the existing jurisprudence of this Court and the lower courts.

B. PERCEIVED MISSTATEMENTS OF LAW AND FACT

1. The Defendant's Reliance on *Lavender* and *Tennant* Is Misplaced

The defendant, at page nine of its brief to this Court, cites *Lavender v. Kern, et al.*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946) in support of the proposition that the appellate court in the present case acted contrary to established jurisprudence in reversing the jury verdict. In *Lavender*, there was a *factual* dispute. As has been mentioned earlier in this brief, and as is expressly set forth in Appendix C, the material facts of the present case are not in dispute. The defendant also argues that *Tennant v. Peoria & P.U. Ry. Co.*, 121 U.S. 802, 64 S.Ct. 409, 88 L.Ed. 520 (1944) prohibits the reversal of the jury verdict in this case. *Tennant* is readily distinguishable from the case currently before the Court. In *Tennant* the issue was whether the employer was *negligent* and if the employer's negligence caused the accident. The dispute in this case is about *legal* responsibilities and relationships – the dispute in the present case is not about negligence or facts.

This Honorable Court is also well aware that many jury verdicts have been overturned in previous FELA cases. The numerous citations in Footnote 26 of *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) illustrate this point. (This is only a listing of jury decisions reversed by the United States Supreme Court prior to 1957.) There are also many other cases where the *trial court* determined the scope of employment and agency issues before the case ever went to the jury. *Getty v. Boston & Maine Corporation*, 505 F.2d

1226 (CA1 1974), *Empey v. Grand Trunk Western R. Company*, 869 F.2d 293 (CA6 1989) and *Vincent v. Harvey Well Service*, 441 F.2d 146 (CA5 1971). See also *Quirk v. New York C. St. L.R. Co.*, 189 F.2d 97 (CA7 1951), at pg. 19.

2. The Defendant's Characterization Of This Case as a Commuter Case Is Incorrect

Missouri Pacific, at page eight of its brief, attempts to characterize the present case as a commuter case. Missouri Pacific then cites *Metropolitan Coal Company v. Johnson*, 265 F.2d 173 (CA1 1959) as if that case was similar to, and therefore controlling with respect to, the present case. The respondent respectfully submits that the *Metropolitan* case is not opposed to Tingstrom's position for the following reasons.

a. *Metropolitan* was not tried or argued as a FELA case. In fact, prior to trial, the plaintiff voluntarily withdrew his FELA claim.

b. The court in *Metropolitan* stated:

> "The only case closely in point which has come to our attention is *Sassaman* . . . " See *Sassaman v. Pennsylvania R.R.*, 144 F.2d 950 (CA3 1944)

c. The plaintiff in *Metropolitan* was commuting from his home to work.

d. The plaintiff in *Metropolitan* had another common law remedy against the railroad; and, in fact the plaintiff in *Metropolitan*, as the plaintiff in *Sassaman* got a favorable verdict.

e. *Metropolitan* was decided less than a month before the Supreme Court rendered its opinion in *Sinkler v. Missouri-Pacific Railroad Co.*, 78 S.Ct. 758 (1958). *Sinkler* made the FELA cases much more understandable.

The only other case cited by the defendant in arguing that this is a commuter case is *Getty v. Boston and Maine Corp.*, 505 F.2d 1226 (CA1 1974). The distinguishing points between *Getty* and the current case are:

a. Getty was on his way from his home to his regular place of work.

b. *Getty's* work day began at 7:00 a.m. and *Getty* was injured at shortly after 6:00 a.m.

c. *Getty* was driving his own automobile to work when because of snow on the road he was forced to park his automobile and catch a regularly scheduled train to work.

d. As Getty walked from the parking lot toward the station platform he slipped and fell injuring himself.

e. The *Getty* court emphasized that Getty was commuting and did not rule out coverage of all railroad employees being transported to or from work.

3. There Is Also a State Law Claim and Other Defendants Are Involved

Missouri Pacific cites (for the first time) in its application to this Court *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 389 (1988). At page eleven of its brief Missouri Pacific states that *Monessen* is a "unanimous decision of this Court" on

the issue of pre-judgment interest. The plaintiff Tingstrom first points out that *Monessen* is not a unanimous verdict on the issue of pre-judgment interest. See Justice Blackmun's opinion (in which Justice Marshall concurred) at p. 342-350. The respondent specifically calls the Court's attention to footnote three of Justice Blackmun's opinion.

Monessen is also distinguishable from the present case. In *Monessen* there was evidently only one defendant, that being the railroad. In the present case, the cab driver and his insurance company are also defendants. (Appendix C and Appendix D) Tingstrom also submits that in the present case, Tingstrom brought a claim under Louisiana Civil Code Article 2315 which states in pertinent part:

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

Pursuant to this article, an action was brought against Missouri Pacific, William Smith and Comco Insurance Company. The Court of Appeal decision (Appendix C) correctly holds these defendants liable in solido for Tingstrom's damages.

4. The Argument of the Railroad that the Appellate Court Could Not Fix the Amount of Damages is Incorrect

At page 10 of its application, Missouri Pacific states that the First Circuit Court of Appeal should have remanded this case to the trier of fact (the jury?) to assess

Tingstrom's damages. In *Icicle Seafoods, Inc. v. Worthington*, 478 U.S. 709, 106 S.Ct. 1527, 89 L.Ed. 739 (1986), Chief Justice Rehnquist, speaking for the Court, stated:

> "But State courts are not required to apply Rule 52(a) – a rule of federal civil procedure – to their own appellate system for reviewing factual determinations of trial courts." at page 712.

Therefore, the Court of Appeal was correct, under Louisiana law, in determining the proper amount of damages. Tingstrom again asserts that there was no conflicting testimony as to the amount of damages suffered; and, even assuming arguendo that the case should have been remanded to the trier of fact as Missouri Pacific contends, then who would that be?

II. CONCLUSION

The respondent, Grant Tingstrom, III, respectfully submits that the judgment of the Louisiana First Circuit Court of Appeal is a correct judgment and should not be disturbed. Respondent further submits that the defendant has cited no considerations (set forth under United States Supreme Court Rule 10) for the granting of a Writ of Certiorari in this case.

Respectfully Submitted,

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APPENDIX A

GRANT TINGSTROM, III VS. WILLIAM L. SMITH, ET AL	18TH JUDICIAL DISTRICT COURT PARISH OF WEST BATON ROUGE STATE OF LOUISIANA

NUMBER 21537

VERDICT FORM

(Filed April 17, 1990)

1. Was William L. Smith negligent and was such negligence a proximate cause of the accident?

Yes ✓
No _____

2. If you found Yes in #1, is the railroad liable for Mr. Smith's negligence?

Yes _____
No ✓

3. At the time of the accident, was Grant Tingstrom, plaintiff, within the course and scope of his employment with Mo-Pac?

Yes _____
No ✓

4. Did any negligence, either on the part of William L. Smith or the railroad cause any of the damages claimed by plaintiff?

Yes ✓
No _____

5. If no, stop here and have the jury foreperson sign and date the verdict form.

   If yes, proceed to questions 6 and 7.

6. What amount do you award for the following damages?

Past pain and suffering and mental anguish	$40,000.00
Future pain and suffering and mental anguish	$ -0-
Past lost income	$ -0-
Future lost income	$ -0-
Future medical expenses	$ -0-
Past medical expenses	$ -0-

7. What percentage of negligence, if any, do you attribute to?

William L. Smith	50%
Missouri-Pacific Railroad	0%
Grant Tingstrom, III	50%
TOTAL	100%

(Total must equal 100% or 0.)

DATE: 17 April 90 /s/ Virgie L. Franques
Jury Foreperson

(Form must be dated and signed. It takes 9 out of 12 to reach any verdict.)

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

GRANT TINGSTROM, III

VERSUS

WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE, COMCO INSURANCE COMPANY, MISSOURI PACIFIC RAILROAD COMPANY AND UNION PACIFIC RAILROAD

NO. CA 90 2283

COURT OF APPEAL FIRST CIRCUIT STATE OF LOUISIANA

OCT 16 1992

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF WEST BATON ROUGE, STATE OF LOUISIANA, NO. 21,537, DIVISION "C", HONORABLE EDWARD N. ENGOLIO, JUDGE PRESIDING.

BEFORE: LOTTINGER, C.J., FOIL AND COVINGTON[1], JJ.

COVINGTON, J.

This action is a suit for damages in tort arising from an automobile accident between a taxi cab in which plaintiff was riding as a passenger and another vehicle. Grant Tingstrom, the plaintiff, filed suit against the taxi driver, William L. Smith, Smith's liability insurer, Comco Insurance Company (Comco) and his employer, Missouri Pacific Railroad Company. Upon plaintiff's motion for

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[1] Judge Grover L. Covington, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

judgment notwithstanding the verdict, the trial judge nullified the jury's finding that plaintiff's own negligence contributed 50% to his injuries and affirmed the jury's finding that (1) plaintiff's injuries were due to the negligence of the taxi driver, (2) plaintiff was entitled to an award of $40,000 in general damages, (3) plaintiff was not in the course of his employment at the time of the accident and (4) the taxi driver was not the Railroad's agent for FELA purposes.

After a thorough review and evaluation of the record, we are convinced the judgment rendered by the trial court was correct. ***Lirrette v. State Farm Insurance Company,*** 563 So. 2d 850 (La. 1990). The appellants are cast for the costs of this appeal.

AFFIRMED.

APPENDIX C

Grant TINGSTROM, III, appellant,

v.

William L. SMITH d/b/a Smitty's Cab Service, Comco Insurance Company, Missouri Pacific Railroad Company and Union Pacific Railroad Company, appellees.

No. 90 CA 2283R.

Court of Appeal of Louisiana,
First Circuit.

Oct. 15, 1993.

Rehearing Denied Dec. 6, 1993.

Railroad employee brought negligence and Federal Employers' Liability Act (FELA) action for injuries suffered while riding to rail yard in taxicab provided by railroad. A jury in the Eighteenth Judicial District Court, Parish of West Baton Rouge, Edward N. Engolio, J., returned verdict for employee against taxicab service, reduced by comparative negligence, and found that employee was not injured in course and scope of employment with railroad. Plaintiff appealed. The Court of Appeal, 610 So.2d 1132, affirmed. On application for writ of certiorari or review, the Supreme Court, 612 So.2d 38, remanded for full opinion. On remand, the Court of Appeal, Lottinger, C.J., held that: (1) employee was injured in course and scope of employment; (2) negligence of taxicab driver could be imputed to railroad; and (3) employee was entitled to damages for past and future medical expenses, past and future wage loss, and was entitled to additional damages for pain and suffering.

Affirmed in part; reversed in part; amended and rendered.

Foil, J., dissented and assigned reasons.

Parro, J., dissented for reasons assigned by Foil, J.

Foil and Parro, JJ., dissent and would grant the rehearing.

Rebel G. Ryland, Columbia, Russell A. Woodard, Ruston, for Grant Tingstrom, III.

Janice B. Unland, Gregory Murphy, Metairie, for William L. Smith d/b/a Smitty's Cab Service and Comco Ins. Co.

Boris F. Navratil, Baton Rouge, for Missouri Pacific R. Co. Union Pacific R. Co.

Before LOTTINGER, C.J., and FOIL, FOGG, PITCHER and PARRO, JJ.

LOTTINGER, Chief Judge.

This case was remanded by the Louisiana Supreme Court for a full opinion. *Tingstrom v. Smith*, 612 So.2d 38 (La.1992). The original opinion of this court appears at 610 So.2d 1132. A remand for a full opinion does not limit the appellate review authority of this court on remand, and thus after a careful reconsideration of our original opinion, we conclude that we erred in affirming the trial court judgment and now revisit this appeal.

FACTS

This suit for damages in tort was brought by Grant Tingstrom, III, an engineer for Missouri Pacific Railroad Company and Union Pacific Railroad Company (MOPAC). The material facts of this case are not in dispute. Tingstrom and three other MOPAC employees were operating a "spray train" which sprayed the railroads tracks with chemicals in order to clear the tracks of plant growth. Tingstrom left Avondale, Louisiana, his home terminal, on March 7, 1989. The spray train discontinued operations for the day in Addis, Louisiana. Pursuant to an agreement between MOPAC and the railworkers union, MOPAC was to provide lodging and transportation whenever employees were required to stay overnight at a place other than their home terminal. MOPAC contracted with the Newcourt Inn in Addis to provide lodging and transportation to and from the rail yard. The Newcourt Inn then contracted with Smitty's Cab Service to provide transportation.

On March 8, 1989, the crew began and ended their day at the yard in Addis without incident. On March 9, 1989, en route to the Addis yard, the taxicab in which the crew was riding rear-ended a full-size van at a stoplight. Mr. Tingstrom, who was riding in the back seat behind the driver, suffered abrasions on his back and complained of stiffness in the lower back area. As a result of those injuries Mr. Tingstrom has undergone two separate operations on his back, and is to date unable to perform his previous job duties due to his physical condition.

Mr. Tingstrom brought suit against William L. Smith, the driver of the taxicab, Smitty's Cab Service, the owner

of the taxicab, and MOPAC. The claims against the driver and owner of the taxicab are based on negligence. The suit against MOPAC is based on the Federal Employers' Liability Act (FELA), Title 45, U.S.C.A. sec. 51, which provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . .

The jury returned a verdict in favor of the plaintiff in an amount of $40,000.00 against William L. Smith and Smitty's Cab Service. The compensation was for past pain and suffering only and was reduced by 50% based on the comparative negligence of the plaintiff. The jury found that MOPAC was not liable for the plaintiff's injuries because Mr. Tingstrom was not in the course and scope of his employment at the time of the accident. The trial judge granted the plaintiff's motion for JNOV with respect to the issue of comparative negligence.

ASSIGNMENTS OF ERROR

The plaintiff presents the following "Specifications of Errors and Issues Presented for Review:"

> I. The jury verdict was clearly wrong and not supported by a preponderance of the evidence.
>
> A. Missouri-Pacific should have been found liable for Tingstrom's injuries.

1. Tingstrom should have been found to be within the course and scope of his employment with Missouri-Pacific.

2. William Smith d/b/a Smitty's Cab Service should have been found to be an agent or employee of the railroad.

3. The railroad should have been found liable for the defective nature of Smith's cab.

B. The jury erred in failing to award Tingstrom:

1. Adequate damages for past pain and suffering

2. Any damages for future pain and suffering

3. Any past or future medical expense and,

4. Any past or future loss of income.

II. The Court erred and the Plaintiff was unduly prejudiced by:

A. The Court allowing the testimony of Dr. Allen Joseph who was not listed on the pre-trial.

B. The Court allowing Pat Crabtree to talk about jobs that Tingstrom could allegedly do.

C. The Court allowing defense counsel to give testimony in argument which testimony was totally unsupported by and contradicted by actual evidence.

D. Failing to give Plaintiff's Requested Instructions No. 25 and 29.

E. Giving Missouri-Pacific Instruction No. 15.

DISCUSSION

Initially we must determine what scope of review is to be applied, federal or state. In a recent decision of this court, *Dufour v. Union Pacific Railroad Company*, 610 So.2d 843 (La.App. 1st Cir.1992), *writ denied*, 614 So.2d 1263 (La.1993), it was held that with respect to actions brought under the FELA, federal standards of review are to be applied by the reviewing state court. See also *Trahan v. Gulf Crews, Inc.*, 260 La. 29, 255 So.2d 63, 66-67 (1971) and *Bailey v. Missouri Pacific Railroad Co.*, 383 So.2d 397, 401 (La.App. 3rd Cir.), *writ denied*, 385 So.2d 784 (La.1980). The standard of review for factual determinations in FELA cases has been articulated as follows: "[o]nly when there is a complete absence of probative facts to support the conclusion reached by the jury does reversible error occur." *Dennis v. Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208, 84 S.Ct. 291, 11 L.Ed.2d 256 (1963). With respect to the trial court's legal conclusions we review the issues de novo.

In order for a plaintiff to prevail on a FELA claim he must establish the following: 1) that the injury complained of occurred while the plaintiff was in the course and scope employment 2) that the injury occurred as a result of negligence 3) that the negligence was perpetrated by the employer or an agent of the employer and, 4) the extent of damage done to the plaintiff.

I.

We address first the question of whether or not the plaintiff was in the course and scope of his employment at the time of the injury. In an early decision of the United States Supreme Court, *Erie Railroad Company v. Winfield*, 244 U.S. 170, 37 S.Ct. 556, 61 L.Ed. 1057 (1917), it was held that a rail worker killed crossing the tracks after his shift had ended was in the course of his employment with the railroad, as the crossing was a "necessary incident of his day's work." The wife of the deceased worker was therefore allowed to maintain the action under the FELA statute. It is the plaintiff's position that the transportation between the yard in Addis and the Newcourt Inn was a necessary incident to the plaintiff's work day.

MOPAC, on the other hand, argues that the controlling cases are "commuter cases" in which the courts have typically held that an employee commuting to and from the worksite from his home, using the employer's trains as a means of transportation, is not within the course and scope of employment. In these cases the determinative issue has been that the employees had freedom of choice as to what mode of transport they would use to get to and from work. *See Young v. New York, N.H. & H.R. Co.*, 74 F.2d 251 (2d Cir.1934), which held that an employee injured while commuting was not in the course and scope of employment, viewing as dispositive the fact that the employee had a choice of route *Sassaman v. Pennsylvania R. Co.*, 144 F.2d 950 (3rd Cir.1944), which found that absent employer compulsion as to the mode of travel to and from work no recovery is available under FELA *Metropolitan Coal Company v. Johnson*, 265 F.2d 173, 178 (1st Cir.1959), where the court found that an employee

injured on the employer's train while commuting was not within the course and scope of his employment as, "[h]e was not required to go to work on the defendant's passenger train" and the defendants's train was only one of several means of transportation the plaintiff may have chosen, and *Getty v. Boston and Maine Corporation*, 505 F.2d 1226, 1228 (1st Cir. 1974), which found that, "absent circumstance indicating a special arrangement with one's employer, subjective conditions resulting from employee choices of where to live and how to travel are insufficiently related to employment to determine coverage of the federal statute." Given the obvious distinctions between the present case and the commuter cases, to wit, that the plaintiff was not traveling from his home to his place of work, but from his place of work to employer provided lodging, and that the plaintiff did not exercise any choice as to the means of transport, we find these cases inapposite.

The plaintiff points our attention to *Leek v. Baltimore & Ohio Railroad Company*, 200 F.Supp. 368 (N.D.W.V.1962), which held that employees who were injured while being transported by cab, pursuant to an agreement between the cab company and the railroad, from their worksite to the rail yard where they were to sign-off for the day were in the course and scope of their employment. MOPAC would have us distinguish this case from the present case as in *Leek* the plaintiff had not officially ended the workday at the time of the accident, whereas in the present case, the plaintiff had not begun his workday at the time of the accident. Given the reasoning behind the holding of the following cases we find this distinction to be artificial.

In *Empey v. Grand Trunk Western Railroad Co.*, 869 F.2d 293 (6th Cir.1989), a railroad employer contracted with a private motor lodge to provide railroad employees lodging during layovers. While at the lodge the employee slipped on the floor of the bathroom which was wet due to a defective latch on the shower door. The appellate court held, "an employee who is injured while he avails himself of housing which his employer has provided and implicitly encouraged him to use is within the scope of his employment for the purposes of the FELA." *Id.* at 295. The court agreed with the trial court's holding that **as a matter of law** the employee was within the course and scope of his employment. *See also Carney v. Pittsburgh & Lake Erie Railroad Company*, 316 F.2d 277 (3rd Cir.), *cert. denied*, 375 U.S. 814, 84 S.Ct. 45, 11 L.Ed.2d 49 (1963), which held that a railroad employee was within the course and scope of his employment while staying overnight at a YMCA. In the present case it is undisputed that the MOPAC implicitly encouraged its' employees to use Smitty's Cab Service for transportation. There was no evidence presented to the effect that the railroad would have reimbursed the plaintiff if he had sought other means of transportation to the hotel. We see no reason to distinguish between the overnight stay itself and the employer provided ride to and from the lodging.

We therefore find that as a matter of law the plaintiff was within the course and scope of his employment with MOPAC at the time of his injuries. The cab ride from the hotel to the Addis yard was a necessary incident to his day's work. The plaintiff had no control over the means of transportation as all arrangements were made by

MOPAC. Facts adduced at trial which reinforce this conclusion include the following: MOPAC required specific insurance limits for cabs providing services to its' employees MOPAC representatives inspected the cab and, MOPAC required the cab driver to display a MOPAC sign in the cab delineating company rules. MOPAC implicitly encouraged its' employees to use Smitty's Cab Service. This issue was improperly submitted to the jury as there was no evidence submitted by MOPAC from which the jury could have concluded that the plaintiff was not within the course and scope of his employment at the time of the accident.

II

We next turn to the issue of whether or not the negligence of Smitty's Cab Company, which is not in dispute, can be imputed to MOPAC based on FELA agency theory. The United States Supreme Court addressed this issue, as well as the general purpose of FELA, in *Sinkler v. Missouri Pacific Railroad Company*, 356 U.S. 326, 78 S.Ct. 758, 2 L.Ed.2d 799 (1958). In *Sinkler*, a MOPAC employee was injured due to the negligence of a switching crew. The switching crew was not employed by MOPAC, yet the court found that the crew was an "agent" of MOPAC for FELA purposes and its' negligence was imputed to MOPAC. The court noted that FELA was a departure from the common law and was a "response to the needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." 356 U.S. at 329, 78 S.Ct. at 762. The holding of the court was that when an employee is injured as a result of the

negligence of others performing "operational activities" of the railroad, such others are "agents" of the employer within the meaning of the FELA.

In *Leek v. Baltimore & Ohio Railroad Company*, 200 F.Supp. at 370-371, the court found that one of the characteristics of the railroad business is transporting employees from one point to another. That court found the negligence of the cab driver imputable to the railroad under FELA agency theory. The court dealt with the issue of operational activities as follows:

> Certainly, there must be many services performed by others under contract with a railroad, which are incidental or even necessary to the corporate purpose of the railroad, which are not "operational activities" within the meaning of those words as employed in the Sinkler case. Just where the line should be drawn, I am neither prepared nor called upon to specify. However, I do not believe that the line should be drawn short of the activities which the taxicab company was performing for the railroad in this case.

200 F.Supp. at 370.

The Jones Act specifically incorporates the standards of FELA with respect to an employer's liability for the acts of agents. In *Hopson v. Texaco*, 383 U.S. 262, 86 S.Ct. 765, 15 L.Ed.2d 740 (1966), the court found that the negligence of a cab driver hired by a shipowner to transport two sick seamen to the U.S. Consulate in Trinidad was imputable to the shipowner under FELA agency theory. The court found that the transportation of the seamen was a vital part of the ship's total operations.

Finally, the courts in both *Carney v. Pittsburgh & Lake Erie Railroad Company*, 316 F.2d at 281-282 and *Empey v. Grand Trunk Western Railroad Co.*, 869 F.2d at 296-297 held that the parties providing lodging for the railroads were performing operational activities of the railroad, thus their negligence was imputable to the railroad.

We therefore hold that FELA is applicable to the plaintiff's claims. He was engaged in the course and scope of his employment with the railroad while being transported by cab to the worksite. The negligence of the cab driver is imputable to MOPAC as the cab driver was performing operational activities of the railroad at the time of the accident. MOPAC's arguments to the effect that it should not be held liable as Newcourt Inn chose the cab company are unpersuasive. MOPAC cannot insulate itself from liability by simply contracting with a third party.

III.

Plaintiff further contends that the jury should have found MOPAC liable for the defective nature of the cab. That is, the plaintiff testified that the door of the cab was missing its interior panel and that the broken door handle caused the abrasions on his back. Given the fact that the jury verdict did not distinguish between the cab driver's negligent operation of the vehicle and the negligent maintenance of the vehicle we are unable to rule on this matter. As MOPAC is liable for the acts of Smitty's Cab Company under the aforementioned agency theory, the precise acts of negligence are irrelevant.

IV.

As stated above the standard of review with respect to the jury's damage award to the plaintiff is whether there is a complete absence of probative facts to support the conclusion reached by the jury. The jury awarded the plaintiff $40,000.00 for past pain and suffering, but refused to award the plaintiff any damages for future pain and suffering, past medical expenses, future medical expenses, or past or future loss of income.

With respect to past and future medical expenses the plaintiff established that the two operations conducted prior to trial cost $42,931.46. The plaintiff also produced evidence that an additional operation would be required at a cost of $25,000.00. The defense produced no evidence to the effect that the surgeries were unnecessary or that the expenses incurred by the plaintiff were inaccurate. The only evidence put on by the defense with respect to past and future medical expenses was the testimony of a doctor who examined the plaintiff's medical records and testified that the plaintiff had a congenital predisposition to the type of back injury from which he currently suffers. The fact that the plaintiff may have been predisposed to a back injury is immaterial to the determination of liability. The defendant takes the plaintiff as he finds him. We therefore conclude that there was a complete absence of probative facts from which the jury could conclude that the plaintiff's past and future medical expenses were unrecoverable, and accordingly, we award the plaintiff $67,931.46.

With respect to past and future lost wages, we find that there were no probative facts introduced by the

defense from which the jury could have concluded that no award was due to the plaintiff. The plaintiff established through documentary evidence and testimony that his past lost wages were $68,892.00. The plaintiff also established, through the testimony of an economist, that his future earning capacity had been reduced by $725,441.00. Based on the variables utilized by the economist, we feel $600,000.00 represents a more accurate and reasonable estimation of the plaintiff's actual loss of future earning capacity.

With respect to past, present, and future pain and suffering, it is the opinion of this court that an award of $40,000.00 was unsupported by probative facts. On July 13, 1988, a percutaneous automated discectomy was performed on the plaintiff. The plaintiff was released from the hospital on July 15, 1988. This operation did not alleviate the plaintiff's pain. According to the plaintiff's medical records, a second doctor performed fusions of the plaintiff's discs on June 21, 1989. The plaintiff was released from the hospital on June 28, 1989. According to the plaintiff's doctor, at the time of the second operation the plaintiff had as severe of back muscle spasms as one can have, making his back as hard as wood. The plaintiff is unable to bend his back. He must wear a back brace at all times to hold the back stable until the fusions become solid. The plaintiff's doctor testified that another operation may be required, and even then the plaintiff will have a fragile back and possibly permanent nerve damage. The defense introduced no evidence rebutting the plaintiff's claims of pain and suffering. Instead, the defense relied on it's unsubstantiated contention that the plaintiff was a dishonest malingerer. This contention was

not supported by any probative facts in the record. As such, we award the plaintiff a total of $300,000.00 in past, present and future pain and suffering.

V.

Plaintiff claims that the trial judge erred in allowing the defense witness, Dr. Allen Joseph, to testify as he was not listed in the pre-trial order. La.Code Civ.Pro. art. 1551 states, in pertinent part, that the pre-trial order may be modified by the trial judge "**at the trial** to prevent manifest injustice." As Dr. Joseph was MOPAC's only witness and was substituted for the Doctor listed on the pre-trial order, we find that the trial judge's modification of the order was appropriate.

Further, the plaintiff contends that the trial judge erred in allowing Pat Crabtree, MOPAC's Louisiana Supervisor, to discuss what other jobs the plaintiff could perform in his current condition. This testimony is clearly relevant under La.Evid.Code art. 401 as it has the tendency to make a fact of consequence, the future earning potential of the plaintiff, more or less probable. The witness also clearly has personal knowledge of the types of jobs available with his employer, thus satisfying La.Evid.Code art. 601 and 602. If the plaintiff wished to test the availability of these types of jobs it was a proper topic for cross examination.

The plaintiff also argues that the trial court erred in allowing the counsel for MOPAC to give testimony in argument which was unsupported and contradicted by the evidence. While not finding that MOPAC's counsel misrepresented evidence in argument to the jury, if that

were the case, the plaintiff, under La.Code Civ.Pro. art. 1632, is entitled to point out such errors to the jury in the rebuttal portion of his closing argument.

In as much as we have previously discussed the trial court's error in submitting instructions to the jury as to the FELA, we need not address the adequacy of the instructions.

Therefore, for the above and foregoing reasons, the judgment of the trial court to the extent that it found liability on the part of William L. Smith and Smitty's Cab Service is affirmed, to the extent that it found no liability on the part of Missouri Pacific Railroad Company and Union Pacific Railroad Company is reversed, and to the extent of the damages awarded, the judgment is amended. There is now judgment in favor of plaintiff, Grant Tingstrom, III, and against William L. Smith, Comco Insurance Company and Missouri Pacific Railroad Company and Union Pacific Railroad Company, in solido, in the sum of $1,036,823.46, together with judicial interest from date of judicial demand, until paid, and for all costs of this proceeding. However, as to Comco Insurance Company, this judgment is limited to the sum of $25,000.00, the limit of its applicable liability insurance coverage, together with interest payable pursuant to the provisions of its insurance contract.

AFFIRMED IN PART, REVERSED IN PART, AMENDED and RENDERED.

FOIL, J., dissents and assigns reasons.

PARRO, J., dissents for reasons assigned by FOIL, J.

FOIL, Judge, Dissenting.

I respectfully dissent.

This case is on remand from the Louisiana Supreme Court. Originally, another panel of this court affirmed the trial court's ruling. *Tingstrom v. Smith*, 610 So.2d 1132 (La.App. 1st. Cir.1992).

The initial opinion of this court was a one page opinion, which concluded as follows:

> After a thorough review and evaluation of the record, we are convinced the judgment rendered by the trial court was correct.

Thereafter, no party applied for a rehearing in this court, but an application for writs was applied for in the Louisiana Supreme Court. The action of the Supreme Court was as follows:

> Granted and remanded to the Court of Appeal, 1st Circuit, for a full opinion.

When this court handed down its opinion and the time for application for rehearing had expired, the decision of this court was final. Only the Supreme Court could then reverse or modify the judgment. The Supreme Court has not done so. It merely remanded the case to us for a full opinion. It apparently wanted a full explanation as to why we affirmed the trial court. And I feel that is all we are authorized to do at this stage of the proceedings.

I feel that this court is without authority to completely change the outcome of the case, as the majority does here. If there is to be any change in the case, only the Supreme Court has the authority to do so at this time.

For the foregoing reasons, I respectfully dissent.

APPENDIX D

STATE OF LOUISIANA * PARISH OF WEST BATON ROUGE * 18TH JUDICIAL DISTRICT

GRANT TINGSTROM, III

VERSUS NO. 21537

WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE, COMCO INSURANCE COMPANY, MISSOURI PACIFIC RAILROAD COMPANY and UNION PACIFIC RAILROAD COMPANY

FILED:___
BY: _____
DEPUTY CLERK OF COURT

PETITION

(Filed March 6, 1988)

The Petition of GRANT TINGSTROM, III, a major domiciliary of Bay St. Louis, Mississippi, who [sic] address is 1230 Old Spanish Trail, Bay St. Louis, Mississippi, respectfully represents that:

1.

Made defendant herein is WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE, whose address is 5751 St. Gerard Avenue, Baton Rouge, Louisiana, and service to be made upon Mr. William Smith, 5751 St. Gerard Avenue, Baton Rouge, Louisiana.

2.

Made defendant herein as well is COMCO INSURANCE COMPANY, a foreign insurance carrier authorized to do and doing business in the State of Louisiana, and

having as its agent for service of process, the Secretary of State for the State of Louisiana.

3.

Made defendant herein as well is MISSOURI PACIFIC RAILROAD COMPANY whose address is 5245 River Road, Avondale, Louisiana, a foreign corporation authorized to do and doing business in the State of Louisiana, and having as their agent for service or process J.M. Kyle, III, 656 North Street, Baton Rouge, Louisiana.

4.

Made defendant herein as well is UNION PACIFIC RAILROAD COMPANY whose address is 5245 River Road, Avondale, Louisiana, a foreign corporation authorized to do and doing business in the State of Louisiana, and having as their agent for service or process J.M. Kyle, III, 656 North Street, Baton Rouge, Louisiana.

5.

On or about March 9, 1988, your petitioner, GRANT TINGSTROM, III, which in the course and scope of his employment with defendant, MISSOURI PACIFIC RAILROAD COMPANY and/or UNION PACIFIC RAILROAD COMPANY, was involved in a vehicular accident as he was being transported from New Court Inn to his place of employment by a taxi cab owned by defendant, WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE. The accident occurred in Brusly, West Baton Rouge Parish, Louisiana.

6.

On or about March 9, 1988, while your petitioner, GRANT TINGSTROM, III, was a passenger in the right rear seat of a taxi cab, owned by WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE, he was thrown forward as the taxi cab in which he was riding slid into another vehicle ahead of it, causing serious personal injury to petitioner.

7.

Petitioner, GRANT TINGSTROM, III, alleges upon information and belief that all times pertinent hereto, the cab driver, was in the course and scope of his employment of his employer, defendant, WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE, and that WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE is responsible for the negligence of the cab driver through the doctrine of respondeat superior.

8.

The accident and casualty complained of herein was caused solely and proximately by the negligence of WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE in the following manner, to-wit:

(1) following too close;

(2) failure to stop before causing an accident;

(3) failure to maintain a proper lookout;

(4) failure to observe the rules of the road;

(5) operating a vehicle in such a manner as to not have the same under control on a major vehicular thoroughfare; and

(6) failing to refrain from any and all further and/or other acts of negligence which may be revealed at or before the trial of this case.

9.

Petitioner alleges, upon information and belief, that at all time pertinent hereto, defendant, COMCO INSURANCE COMPANY, had in full force and effect a policy of liability insurance covering any and all acts of negligence pertinent to this cause.

10.

Petitioner further alleges, that he was in the course and scope of his employment with defendant, MISSOURI PACIFIC RAILROAD COMPANY and/or UNION PACIFIC RAILROAD COMPANY, at the time said accident occurred.

11.

Petitioner show upon information and belief that WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE was an agent of petitioner's employer, MISSOURI RAILROAD COMPANY and/or UNION PACIFIC RAILROAD COMPANY, and that as such, his employer is vicariously liable for the negligent acts of WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE.

12.

As a result of the above described casualty, your petitioner, GRANT TINGSTROM, III, suffered personal injuries including, but not limited to, a partial subluxation and inflammation of the left sacroiliac joint, and severe multiple myoligamentous strains and sprains to the lumbroscacral regions to the spine.

13.

The personal injuries of your petitioner, GRANT TINGSTROM, III, were a direct result of the negligence and want of care by defendants, MISSOURI PACIFIC RAILROAD COMPANY and/or UNION PACIFIC RAILROAD COMPANY and WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE.

14.

As a result of the negligence and casualty complained of your petitioner, GRANT TINGSTROM, III, has sustained the following losses, itemized, but not limited to:

Past, physical pain and suffering

Future physical pain and suffering

Past mental anguish, suffering and embarrassment

Future mental anguish, suffering and embarrassment

Loss of income, past and future

Future loss of enjoyment of life and impairment of life style

Past disability

Future disability

Past medical and out-of-pocket expenses

Future medical and out-of-pocket expenses

WHEREFORE PETITIONER PRAYS for service and citation on the defendants, WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE, to be served through William L. Smith 5751 St. Gerard Avenue, Baton Rouge, Louisiana, COMCO INSURANCE COMPANY, through their agent for service of process the Secretary of State for the State of Louisiana, MISSOURI PACIFIC RAILROAD COMPANY through their agent for service of process J. M. Kyle, III, 656 North Street, Baton Rouge, Louisiana and UNION PACIFIC RAILROAD COMPANY, through their agent for service of process J.M. Kyle, III, 656 North Street, Baton Rouge, Louisiana.

WHEREFORE PETITIONER FURTHER PRAYS THAT after due proceedings had, that there be judgment herein in favor of petitioner, GRANT TINGSTROM, III, and against defendants, WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE, COMCO INSURANCE COMPANY, MISSOURI PACIFIC RAILROAD COMPANY and UNION PACIFIC RAILROAD COMPANY, and that petitioner be awarded damages reasonable in the premises, together with legal interest from date of judicial demand until paid.

WHEREFORE PETITIONER FURTHER PRAYS THAT all costs of these proceedings be cast against the defendants.

WHEREFORE PETITIONER FURTHER PRAYS for full, general and equitable relief.

Respectfully submitted,

McKEITHEN, WEAR, RYLAND & WOODARD

By: Rebel G. Ryland
REBEL G. RYLAND
P.O. Box 1029
Columbia, Louisiana 71418
Bar Roll No. 11566
Telephone: (318) 649-2626

ATTORNEY FOR PETITIONER

PLEASE SERVE DEFENDANT:

(1) WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE, through William L. Smith, 5751 St. Gerard Avenue, Baton Rouge, LA 70805

(2) COMCO INSURANCE COMPANY, through their agent for service of process the Secretary of State for the State of Louisiana

(3) MISSOURI PACIFIC RAILROAD COMPANY, through their agent for service of process J. M. Kyle, III, 656 North Street, Baton Rouge, LA 70802

(4) UNION PACIFIC RAILROAD COMPANY, through their agent for service of process J. M. Kyle, III 656 North Street, Baton Rouge, LA 70802

APPENDIX E

GRANT TINGSTROM, III	:	NUMBER
VERSUS	:	21537
WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE, COMCO INSURANCE COMPANY, MISSOURI PACIFIC RAILROAD COMPANY AND UNION PACIFIC RAILROAD COMPANY	:	18TH JUDICIAL DISTRICT COURT
	:	PARISH OF WEST BATON ROUGE
	:	STATE OF LOUISIANA

ANSWER TO PETITION

Missouri Pacific Railroad Company and Union Pacific Railroad Company answer plaintiff's petition as follows:

1.

The allegations are admitted.

2.

The allegations are admitted.

3.

Missouri Pacific Railroad Company admits that the allegations concerning its corporate structure and agent for service of process are correct and that it has been made a defendant herein; however, it denies any liability to plaintiff.

4.

Union Pacific Railroad Company denies the correctness of the allegations of paragraph 4 and denies any indebtedness to plaintiff of any kind.

5.

The allegations are admitted.

6.

The allegations are denied.

7.

The allegations are admitted on information and belief.

8.

The defendants admit that the collision between the vehicle driven by William L. Smith and the vehicle he was following, was due to William L. Smith's negligence.

9.

These defendants have no information on the basis on which to admit or deny the correctness of the allegations of paragraph 9.

10.

Answering paragraph 10, defendant, Missouri Pacific Railroad Company avers that at the time of the incident, petitioner was on his way to work but had not yet entered upon the discharge of his work-connected duties. Defendant, Union Pacific Railroad Company denies that it does business in the State of Louisiana, in its own corporate capacity, and further denies that petitioner was its employee.

11.

The allegations are denied.

12.

The allegations are denied.

13.

The allegations are denied.

14.

The allegations are denied.

WHEREFORE, defendants, Missouri Pacific Railroad Company and Union Pacific Railroad Company pray for judgment rejecting plaintiff's demand and dismissing his suit against these defendants, at plaintiff's costs.

Defendants further pray for a trial by jury and that this Court set the proper jury bond to be furnished by the defendants and the date on which it is to be furnished.

By Attorneys,

BREAZEALE, SACHSE & WILSON
23rd Floor, One American Place
Post Office Box 3197
Baton Rouge, LA 70821-3197
Telephone: (504) 387-4000

Boris F. Navratil
Bar Roll # 9909

ORDER

CONSIDERING, the foregoing request for a jury trial:

IT IS ORDERED that this matter be tried by a jury provided a jury bond in the amount of $___ be fixed in this Court ___ days in advance of trial by the requesting party and ___ days in advance of trial by any non-requesting party.

Port Allen, Louisiana, this ___ day of May, 1989.

Judge, 18th Judicial District Court

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing answer to petition has been sent this date, United States Mail, postage prepaid and properly addressed, to all counsel of record.

Baton Rouge, Louisiana, this ___ day of May, 1989.

Boris F. Navratil